No. 11840

United States Circuit Court of Appeals

For the Ninth Circuit

THE PULLMAN COMPANY, a corporation

Appellant

v.

MAGGIE MAE TEUTSCHMAN,

Appellee

Upon Appeal from the District Court of the United States for the District of Oregon.

BRIEF OF APPELLANT

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JURISDICTION OF THE COURT

This action was originally instituted in the Circuit Court of the State of Oregon for the County of Multnomah, and was removed by the defendants to the District Court of the United States for the District of Oregon (R. p. 9). Jurisdiction of the District Court

was founded on diversity of citizenship, Section 41-1 of the Judicial Code (28 U. S. C. A. 41-1). The removal proceedings were pursuant to 28 U. S. C. A., Section 71.

Jurisdiction of the Circuit Court of Appeals is founded upon Section 128, as amended, of the Judicial Code (28 U. S. C. A., Section 225(a)(1)). This appeal has been taken from a final decision of the District Court of the United States for the District of Oregon within the meaning of Section 128 of the Judicial Code.

STATEMENT OF CASE

This action was instituted by the appellee, Maggie Mae Teutschman, against the appellant, The Pullman Company, and Southern Pacific Company, to recover damages for personal injuries sustained on January 9, 1946, while appellee was riding as a passenger on appellant's tourist car attached to a Southern Pacific train. The action was later dismissed as to Southern Pacific Company (R. p. 21). The injuries are alleged to have been sustained when appellee fell from an upper berth.

The charges of negligence against appellant, as set forth in the amended complaint (R. pp. 11, 14) and

as settled by the pretrial order (R. pp. 21, 24) were that appellant failed to equip the berth with curtains and protective straps and to close and fasten the curtains; that it failed to advise the appellee concerning the necessity and manner of properly fastening the curtains and was negligent in requiring the appellee to take an upper berth. The charges of negligence were denied by appellant, which contended appellee's injuries were proximately caused by her failure to take any care or precaution for her safety, her failure to fasten the buttons on the curtains, permitting the curtains to become parted in such a way as to allow her to fall from the berth, and failure to use her senses and faculties to avoid injury to herself.

At the trial there was a sharp conflict in testimony concerning the accident. Appellee's version was that appellant had assigned her to an upper berth not equipped with curtains or protective devices to prevent her from falling; that nevertheless she retired and fell asleep and that during the night she fell from the berth.

Appellant's testimony was that the berth was equipped with the usual Pullman curtains, securely fastened at top and bottom to rods secured to the berth; that after appellee had retired the porter closed

the curtains; that during the night appellee was found in the aisle of the car, at which time the curtains were observed to have been pulled slightly apart; that because of the manner in which the curtains were affixed to the berth it would have been impossible for appellee to have fallen in the manner claimed. It was appellant's theory that appellee was injured when she attempted to leave her berth without requesting assistance.

Because of the findings entered by the court, which will hereinafter be discussed, the appellee's condition prior to the accident, within the knowledge of appellant, is material. In this regard, appellee presented no evidence of an abnormal condition prior to the accident. She testified that she was 63 years of age and before the accident was slightly lame, due to an old injury to her right hip; that her lameness did not affect her health in any way and did not interfere with her performance of work, and, in fact, was hardly noticeable. Appellee testified that prior to the accident she was feeling "wonderful" and not suffering any pain; and that she took no medicine either before or after retiring.

On the other hand, evidence was presented by appellant that when appellee first entered the car the

conductor received the impression that she was intoxicated, but when he talked with her he realized she was not. There was also testimony that while waiting for her berth to be made up, she swallowed a large yellow capsule, the nature of which was unknown to appellant. After retiring, she rang the bell for the porter and when the conductor answered, asked for water to take some medicine. Following the accident and after appellee had been removed to a hospital at Redding, California, a yellow capsule was found in her berth. At the hospital the attendants found in her effects a bottle of nembutal capsules. It was the opinion of the attending physician that she had taken at least two of them, which accounted, in his opinion, for a drowsy condition causing her to sleep heavily despite her injury.

At the close of the testimony appellant moved to dismiss the case on the ground that under the facts and law appellee was not entitled to any relief. The court denied the motion and took the case under advisement. Several days later the court rendered a memorandum decision holding that the proximate cause of the accident was the failure of appellant to see that the inside buttons on the upper curtains were fastened which, in the court's opinion, would have

prevented appellee either from getting out or falling out of the berth; and permitted the complaint and pretrial order to be amended accordingly (R. p. 29). Pursuant to this memorandum decision, an order was entered on September 29, 1947, amending the amended complaint and pretrial order as directed by the court (R. p. 30), and on October 4, 1947, the court entered findings of fact and conclusions of law and judgment for appellee in the amount of $5500.00, general damages, and $1286.50, special damages (R. pp. 31, 34). Thereafter appellant filed a motion to amend the findings to make specific findings concerning the charges of negligence on which the case was tried (R. p. 35). The court allowed the motion to the extent of finding that the berth was equipped with curtains securely affixed at top and bottom to rods extending the full length of and parallel with the berth, but denied the remainder of the motion (R. p. 37).

This appeal concerns whether there was any substantial evidence to sustain the findings of the court.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding that appellant was negligent in failing to fasten the inside buttons on the curtains of appellee's berth.

2. The District Court erred in finding that the injuries to appellee were proximately caused by appellant's failure to fasten the inside buttons on the curtains of her berth.

3. The District Court erred in finding that the injuries to appellee were not proximately caused by her contributory negligence.

4. The District Court erred in overruling appellant's motion to dismiss.

5. The District Court erred in permitting amendment of the amended complaint and pretrial order after the cause had been submitted.

SUMMARY OF ARGUMENT

1. There was no substantial evidence of any abnormal condition of appellee within the knowledge of appellant sufficient to impose upon appellant the extraordinary duty to fasten the inside buttons of the curtains on appellee's berth.

2. Fastening the buttons would have been a futile precaution and the failure to so fasten them was not the proximate cause of the accident.

3. Appellee was contributorily negligent in separating the curtains and attempting to leave the berth

without assistance, or placing herself in a position where it was possible for her to fall from the berth.

4. There being no evidence of negligence by appellant which proximately caused the accident and appellee having been contributorily negligent, the motion to dismiss should have been allowed.

5. The question whether appellee was in such abnormal condition as to require of appellant the extraordinary precaution of fastening the inside buttons on the curtains was not an issue at the trial and the court should not have based a finding of liability thereon.

ARGUMENT

1. There was no substantial evidence of an abnormal condition of appellee, within the knowledge of appellant, requiring it to take extraordinary precautions for her safety.

As indicated in the foregoing statement, the decision of the District Court was based upon findings entirely foreign to the issues in the pleadings or pretrial order. The controversy at the trial concerned whether there were any curtains on the berth, whether they were fastened at the bottom to a rod extending the length of the berth, and whether they were closed.

The District Court found the first two of these issues against appellee and declined to make any finding concerning the third (R. p. 37). It found, however, that appellant was negligent in failing to fasten the inside buttons on the curtains, which, it believed, would have prevented appellee either from *getting out* or falling out of the berth.

The failure to make a finding concerning the position of the curtains requires the assumption that they were closed, for the purpose of determining whether appellant was negligent. *Erdman v. United States, et al.*, 143 F. (2d) 198. Certiorari denied 65 S. Ct. 122, 323 U. S. 769, 89 L. Ed. 615. The testimony established that with the curtains closed, it would have been impossible for appellee to have fallen from the berth (R. pp. 151, 165, 167, 169). The testimony of all witnesses who observed the berth shortly after the accident was that the curtains had been parted only about six to fourteen inches (R. pp. 145, 165, 169, 177), thus indicating that appellee must have been injured when she attempted to leave her berth without requesting assistance. The District Court's finding that fastening the inside buttons would have prevented appellee from *getting out* of the berth indicates that the District Court accepted this version of the manner in which the accident occurred. How-

ever, it believed that appellant was under obligation not only to take precautions against appellee's falling from the berth but also against her attempting to leave the berth.

We do not understand it to be the view of the District Court that the obligation to fasten the inside buttons on the curtains applies to sleeping car companies under all circumstances. The Court's opinion is predicated upon its finding that appellee was in such crippled and confused condition, within the knowledge of appellant, that an additional obligation existed to protect the appellee from her own voluntary acts.

Appellant contends that there is no substantial evidence that appellee was crippled or confused, within appellant's knowledge, to such an extent as to require this unusual precaution. The conclusion that she was crippled or confused in any degree can be reached only by rejecting her testimony in its entirety as unworthy of belief. Thus, she testified that prior to the accident she was in perfect health (R. p. 49); that although she had an old abscess in the groin, causing her to limp slightly, this did not affect her health in any way and did not prevent her from performing her work (R. p. 50). She testified that

when she boarded the train she felt "wonderful"; that she took no medicine of any kind and was not suffering from any pain (R. pp. 99, 100). Thus, if her testimony were accepted, there could have been no duty to exercise any unusual precautions.

Apparently, however, the District Court did not consider her testimony in this regard as worthy of belief and inferred from appellant's evidence that she was in such crippled and confused condition as to require precautions amounting to physical restraint. It is submitted that appellee is bound by her testimony concerning her condition prior to the accident and cannot now assert that her condition was such as to require extraordinary precautions by the appellant. The rule in this regard is stated in 80 A. L. R. 625-627, as follows:

> "A majority of the cases support the rule that a party is concluded by his own testimony which is favorable to the adverse party."
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> "The statement which comes nearest to enunciating a true general principle seems to be that of the Massachusetts Court in *Hill v. West End Street R. Co.* (1893), 33 N. E. 582, that a party may be permitted to contradict his own testimony 'if the circumstances are consistent with honesty and good faith.'"
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> * * * * *

"If a party's testimony consists only of a narrative of events in which he participated or which he observed, there is an obvious possibility that he may be mistaken like any other witness. In such a situation, if other witnesses give a different version of the occurrence, his testimony must be weighed with their's, and he will not be concluded by his own statements. But when a party testifies to facts in regard to which he has special knowledge, such as his own motives, purposes, or knowledge, or his reasons for acting as he did, the possibility that he may be honestly mistaken disappears. His testimony must be either true or deliberately false. To allow him to contradict his own testimony under those circumstances would not be 'consistent with honesty and good faith.' Whether his statements be true or false, he will be bound by them, and possible contradictions by other witnesses become immaterial. He will not be allowed to obtain a judgment based on a finding that he has perjured himself. * * * But when a man of mature years and unimpaired mentality testifies understandingly and definitely to facts peculiarly within his knowledge, any rational conception of justice demands that he be judged by what he says."

In *L. P. Larson, Jr. Co. v. Wm. Wrigley, Jr. Co.* (1918), 253 Fed. 914 (Certiorari denied 248 U. S. 580), the court said:

> "In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true."

In *Van Meter v. Zumwalt* (Idaho, 1922), 206 Pac. 507, the plaintiff, when called as a witness in his own behalf, on cross examination, repudiated the very grounds on which rested the cause of action stated in the complaint. The court held that the statements constituted informal judicial admissions, which were accorded the quality of prima facie proof.

In *Jacobs v. Cedar Rapids* (Iowa, 1917), 164 N. W. 891, the court said:

> "While a party is at liberty to show by one witness what is opposed to the testimony given by another, this will not permit such party for his own advantage to say that the testimony given by himself shall be treated as false and that of an opposing witness as true."

In *Stearns v. Chicago R. I. & P. R. Co.* (Iowa, 1914), 148 N. W. 128, it was held that a party to a suit is bound by his own testimony, which he does not, at any time, seek to correct or change during the course of the trial.

In *Dunham v. Carbon, Coal & Mining Co.* (Kan., 1879), 15 Mo. Min. Rep., the court said:

> "Where testimony is drawn from the lips of a party or his agent, no wrong will ordinarily be done such party if the testimony so given be accepted as true. A party's admissions are good against him; so is his testimony."

In *Steele v. Kansas City S. R. Co.* (Mo., 1915), 175 S. W. 177, the court, in holding a party bound by his admission of facts showing contributory negligence, said:

> "No litigant in his own sole case ought to be heard by a court, without some explanation or excuse, to deny today what he solemnly swore was true on yesterday."

It is obvious that appellee's lameness had nothing whatever to do with the accident. If the appellee was in any degree confused prior to the accident, the explanation must be found in the appellant's testimony that she took certain medicine shortly before and after retiring, which testimony was denied by appellee (R. p. 99). Only the appellee knows with certainty what her condition of mind was at the time she retired to the berth. She should be held bound by her testimony in that regard and should not now be permitted to assert that she was not in a condition to exercise care for her safety.

Even if appellee is permitted to ignore her own testimony and resort to appellant's evidence for support, a review of such evidence reveals nothing from which to infer that appellee was unable to care for herself, or that appellant had knowledge of any condition which would require the extraordinary precaution of buttoning the curtains. According to appellant's testimony, the conductor and porter first saw appellee approaching the Pullman car from the station at Martinez, California. She was limping and carrying a shopping bag and violin case (R. pp. 140, 157). Arriving at the car, she showed the conductor her ticket, which was for an upper berth on a following train (R. p. 157). When she complained about going back to the station to wait for the proper train, the conductor "took pity on her" because she was poorly dressed and crippled and agreed to give her a berth on his train. She did not appear to be in any pain (R. p. 158).

After getting on the car appellee asked for a glass of water to take some medicine and swallowed a large capsule, the nature of which was unknown to the conductor. While the conductor's first impression was that she had been drinking, when he talked with her he realized she had not (R. p. 159). When asked what gave him the first impression, he replied: "Just

her actions, acting like a person who had been drinking" (R. p. 160). When her berth was made up the porter helped her in and pulled the curtains (R. pp. 142, 143, 161). These curtains were attached to rods at top and bottom in such manner that with the curtains closed it was impossible for a person to fall out of the berth (R. pp. 151, 165, 167, 169).

Later that night the conductor noticed that the curtains were closed (R. p. 161). Once he saw appellee's foot protruding from the berth and shoved it back in. She did not awaken and he closed the curtains again (R. p. 161). Later appellee rang the bell and when the conductor answered, she asked for water to take some medicine. He brought her the water but did not see her, as the curtains were closed (R. p. 162).

The foregoing is a fair summary of all of the evidence concerning any knowledge of appellant about the condition of appellee prior to her injury. From the testimony by deposition of Dr. McVickers, who treated appellee after her removal to the hospital at Redding, California, it is fairly evident that appellee had been taking nembutal capsules in sufficient quantities to have affected her in some degree. It was his opinion that at least two of such capsules would have been necessary to have produced the condition in

which he observed the appellee at the hospital the following day (R. pp. 186, 201).

Appellee denies having taken any medicine and the only evidence as to the quantity which she may have taken, aside from Dr. McVicker's testimony, is the conductor's testimony of one capsule taken shortly before she retired and, persumably, one capsule after she retired. It is a fair assumption that these capsules, and perhaps others she had taken earlier, produced the condition in appellee which Dr. McVickers noted on the following day. In view of the evidence concerning the position of the curtains before and after the accident, it is also a fair assumption that for some unexplained reason appellee attempted to leave the berth during the night, and in so doing fell to the floor.

The question to be determined is whether appellee's condition, within the observation of the conductor and porter, was such that they reasonably should have anticipated an irresponsible act on her part. It seems clear that the information available to the conductor and the porter did not indicate such "confusion" that they should have anticipated she would try to leave the berth without assistance. The conductor did not know the contents of the capsules. While he at

first thought she was intoxicated, he realized she was not when he talked with her. There was, therefore, nothing in the way of notice to the conductor other than a superficial appearance of intoxication. It is submitted that under these circumstances appellant's employees were not bound to anticipate a willful or irresponsible act such as an attempt to leave the upper berth without assistance.

It is recognized that a sleeping car company owes a high degree of care towards its passengers and that the care must be commensurate with the circumstances within the knowledge of the company. 13 C. J. S. 1256. It is also recognized that a duty of additional care exists where the company has knowledge of a disability requiring such additional care. 13 C. J. S. 1289. But the duty is measured by the company's knowledge. 13 C. J. S. 1290. It need not exercise every possible care and need not act as guardian over passengers to the extent of coercing them into exercising ordinary care. It is not bound at its peril to render an injury impossible and it may assume that the passenger will act with due regard for his safety. 13 C. J. S. 1260, Note 92. The care required in a particular instance where a passenger is disabled is the care commensurate with the manifest disability. Whether a particular precaution is necessary depends

upon whether the carrier has notice of a condition from which it should anticipate an accident unless such precaution is taken. *Hicks v. Scott, et al.* (Cal.), 120 P. (2d) 107, 109.

The rule requiring extraordinary precautions is frequently applied in the case of children, elderly persons, intoxicated persons and those who are mentally deranged. Appellee did not fall within any of these classes, but the rules applied in such cases should be helpful in determining what duty was imposed upon appellant's employees.

It is the rule that mere intoxication imposes no additional duty upon a carrier unless the passenger is helpless and unable to look out for his own safety. 13 C. J. S. 1292. Thus, in *Louisville & N. R. Co. v. Barnes' Adm'x.* (Ky., 1944), 180 S. W. (2d) 546, it appeared that an intoxicated passenger had been killed when he got off the train. It was claimed that the carrier's employees should have restrained him. In denying recovery the court found it significant that while the passenger had staggered, he was able to walk down the aisle, give his ticket to the conductor and perform other usual acts accompanying travel. It concluded that the proof was insufficient to show that the passenger was so helpless that the carrier's employees

should reasonably have known that he was unable to care for himself.

In *Louisville H. & St. L. Ry. Co. v. Gregory's Adm'r.* (Ky., 1911), 133 S. W. 805, the court held that a train crew was not required to anticipate that merely because a passenger is intoxicated he will necessarily expose himself to danger.

The case of *Louisville & N. R. Co. v. Mudd's Adm'x.* (Ky., 1917), 191 S. W. 102, involved the death of an intoxicated passenger who was killed when he fell or jumped from the train. The court found that the decedent's behavior on the train did not indicate that he was in such a state of intoxication that the employees of the carrier should have anticipated the injury.

As we have stated, appellee's accident can be accounted for only upon the assumption that she tried to leave her berth. If she was then irresponsible and helpless, such condition obviously was brought about as a result of her taking two capsules of nembutal while on the train. There was no evidence that she was in any way irresponsible or helpless before she retired to her berth. In fact, the evidence is to the contrary. At Martinez, California, she changed trains, and after awaiting the arrival of Train No. 18, she

carried her baggage to the train and presented her ticket to the conductor. The fact that she chose the wrong section of the train was a natural error and does not indicate that she was irresponsible or helpless. According to the conductor, when she was informed that she had the wrong train, she complained about going back to the station and was, therefore, permitted to take passage on Train No. 18. She asked the conductor for a lower berth and asked for water with which to take some medicine. After retiring, she rang the bell for the porter. All of these were the acts of a normal individual and rebut any inference that she required special care or that the carrier should have anticipated that she would render herself so irresponsible that she would require physical restraint.

The basis for the ruling of the District Court would impose an unreasonable burden upon carriers. Only reasonable care was required, commensurate with any unusual conditions which were visible to the appellant's employees. They were entitled to assume that appellee was sane and sober until the contrary appeared. *Sullivan v. Seattle Electric Co.* (Wn., 1908), 97 Pac. 1109. Before the appellant should be held to the duty of physically restraining the appellee, it would seem that the appellee must show that her con-

dition, within the knowledge of the appellant, was such that it should have anticipated irresponsible acts.

In *Chicago, R. I. & G. Ry. Co. v. Sears* (Texas, 1919), 210 S. W. 684, the court observed that while the carrier must bestow upon a passenger who is mentally incapable of caring for himself any special care which reasonable prudence and foresight demands for his safety, considering the conduct and disposition of mind manifested by the passenger, or any conduct or disposition which might reasonably be anticipated from one in his mental condition, "the additional care in such case, however, is measured by the knowledge which the carrier had or should obtain by observation of the passenger's incapable condition." It found that where the only information the carrier had as to the mental condition of a passenger was that he was laboring under the delusion that someone wanted to kill or rob him, the crew in charge of the train could not anticipate that he would leave the train while it was in motion or thereafter voluntarily injure himself.

A similar decision was rendered in *St. Louis Southwestern Ry. Co. of Texas v. Adams* (Texas, 1914), 163 S. W. 1029. In this case a demented woman, under the delusion that she was about to be robbed, jumped

through the window of a train. Prior thereto she was apparently asleep. The court held there was nothing in her actions to indicate to the carrier that she was about to jump through the window.

In *Watts v. SP&S* (Or., 1918), 88 Or. 192, 171 Pac. 901, the court said:

> "The rule with respect to the duty owing persons of advanced age or other disability is that they should be given such assistance as their appearance reasonably indicates is necessary; and the train employee is bound to consider only such facts with respect to the passenger's condition as are within his knowledge, or are made known to him through the passenger's appearance, or otherwise."

In the case of *Price v. St. Louis, I. M. & S. R. Co.* (Ark., 1905), 88 S. W. 575, where an intoxicated passenger went upon the platform of the train and fell therefrom, the court said:

> ". . . The railroad company must bestow upon one in such condition any special care and attention, beyond that given to the ordinary passenger, which reasonable prudence and foresight demand for his safety, considering any manner of conduct or disposition of mind manifested by the passenger and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental

and physical condition, which would tend to increase the danger to be apprehended and avoided."

In *Trippett v. Monongahela West Penn Public Service Co.* (W. V., 1925), 130 S. E. 483, where a boy fell from a platform of a train, it was contended that the carrier should have kept him inside the car. It was held that the high degree of care required of the carrier is more strictly applicable to its affirmative acts or omissions of duty toward the passenger than to the control of his person or conduct after he has become a passenger. It was said that the duty did not go to the range of impossibility or unreasonableness.

In the case at bar the appellee was asleep shortly before the accident. The absence of findings concerning the position of the curtains on her berth requires the assumption that they were closed. It is common experience that there is no danger of falling from a berth on a sleeping car when the curtains are closed, even though they may not be buttoned. Appellant's employees could not anticipate an accident unless they could anticipate that appellee would attempt to leave the berth without help. To assume that she would be disposed to do so the crew must have had knowledge that she was irresponsible. Necessarily the members of the crew could not have acquired such

knowledge because, on the occasion of the last contact between members of the crew and appellee prior to the accident, she was not irresponsible; and if she became so, it must have been the result of the nembutal capsules which she took shortly before and after retiring.

While appellant knew that appellee was taking some kind of medicine, it could not anticipate that these capsules would produce such an irresponsible condition that appellee would attempt to leave the berth without ringing the bell for the porter. Appellant's employees had no means of knowing what the capsules contained; and had they had this information, they would have been justified in assuming that the medicine would induce sleep, rather than departure from her berth. The knowledge of appellant's employees surely was not sufficient to require them to take measures amounting to physical restraint. They could hardly anticipate that she would attempt to leave her berth without ringing the porter's bell for assistance.

It is therefore submitted that there was no substantial evidence upon which to base a finding that appellant was negligent in failing to fasten the inside buttons on the curtains.

2. The failure of appellant to fasten the inside buttons on the curtains of appellee's berth was not the proximate cause of the accident.

In order to constitute proximate cause it must appear that the act or omission complained of was one without which the accident would not have happened. As pointed out, the position of the curtains after the accident points conclusively to the fact that the accident could not have happened in the manner claimed by appellee and must have happened when appellee separated the curtains and crawled or slid through the opening. The District Court's ruling appears to recognize the truth of this assertion, but assumes that appellee was so irresponsible, within the knowledge of appellant, that she should have been confined and physically prevented from leaving the berth by fastening the inside buttons on the curtains.

According to the testimony, the inside buttons on the curtains are intended for the use of the passenger (R. p. 143). Assuming that it was possible to fasten these buttons from the outside, which may be doubted in view of the construction of the curtains (see Exhs. 5, 6, 7 and 8), there would have been nothing to prevent the appellee from unbuttoning the curtains and leaving the berth. If she was able to spread the curtains apart and leave the berth, it seems unrea-

sonable to suppose that she was incapable of unfastening the buttons if they had been fastened. In fact, it is by no means clear that even with the buttons fastened appellee would not have been able to leave the berth in the same manner that she must have left it when she received her injuries.

We think it clear that the proximate cause of the accident was appellee's act in separating the curtains and attempting to leave the berth and that any negligence of the appellant became remote upon the doing of this act by appellee. In 38 Am. Jur. 735, it is said:

> ". . . In fact, the chain of causation between the defendant's negligence and the plaintiff's injury is broken when an independent act of the plaintiff, not within the reasonable contemplation of the defendant, intervenes to bring about the injury. Under such state of facts, the negligence of the defendant is regarded as the remote cause and the intervening act of the plaintiff as the proximate cause of the injury. This is true whether or not the plaintiff's act amounts to contributory negligence and whether or not the infancy of the plaintiff precludes contributory negligence on his part."

The act of appellee in separating the curtains and attempting to leave the berth surely was an independent act of the appellee not within the reasonable contemplation of appellant and was thus sufficient to

break the chain of causation. But if it was not an independent act beyond the reasonable contemplation of appellant, buttoning the curtains would have been a futile precaution. Surely there is no reason to believe that appellee would not have unbuttoned the curtains, in which case the accident would have happened in the precise manner that it did happen.

It is therefore submitted that the District Court erred in finding that failure of appellant to fasten the inside buttons on the curtains was the proximate cause of the accident.

3. **Appellee's injuries were proximately caused by her contributory negligence.**

As stated above, the District Court found that appellee's berth was equipped with curtains properly affixed to rods at the top and bottom and extending the full length of the berth, but declined to make a finding whether the curtains had been closed. We find it difficult to discuss this specification because of uncertainty as to the court's views concerning the position of the curtains. If the court had found that the curtains were not closed, we believe contributory negligence of appellee would be self-evident, since she retired and went to sleep without looking for curtains, asking for them or taking any precautions to

prevent her falling (R. pp. 93, 94). However, since the court based its finding of liability upon the failure to fasten the inside buttons on the curtains and not upon the failure to close the curtains, we assume for the purpose of discussion of this specification of error that the curtains were closed after appellee had retired.

It is established by the evidence that because of the manner in which the curtains were constructed it would have been impossible for a person to fall from the berth when the curtains were closed. It is also established by the testimony that following the accident the curtains were observed to be spread apart only six to fourteen inches. It is therefore evident that appellee's injuries resulted from her act in spreading the curtains and placing herself in such position that it became possible for her to fall through the opening to the floor.

Assuming that appellant was negligent in failing to fasten the curtains, it would seem that appellee was equally negligent in failing to do so; and that she was also negligent in spreading the curtains apart and attempting to leave the berth, or placing herself in such a position that she could fall through the opening.

The rule is well established that a passenger must exercise care for his own safety. 13 C. J. S. 1575. He must take notice of the usual and obvious hazards and there is no duty to warn him of an obvious danger. Even though the carrier is negligent the passenger must, if he knows of such negligence, take due precautions for his safety; and if injury arises from the want of ordinary or proper care on his part the carrier is not liable. *Dahl v. Minn. St. Paul & S. S. M. Ry.* (N. D., 1929), 223 N. W. 37.

In the case of *Pazik v. Milwaukee Electric Ry. & Transport Co.* (Wis., 1944), 245 Wis. 583, 15 N. W. (2d) 804, 805, it was charged that a bus driver was negligent in failing to assist a disabled passenger to arise from her seat. Rejecting this contention, the court said:

> "It should be noted that the jury found the plaintiff not negligent in attempting to arise, without aid. If knowledge were attributable to the driver that plaintiff needed aid to arise, it would certainly be attributable to the plaintiff, who certainly knew her own condition better than the driver could possibly have known it. If the driver was negligent in not assisting her to rise, she with like reason was negligent in attempting to rise without asking his assistance when he was sitting within a foot or two from her."

Likewise, in this case, if it was negligence for the appellant to fail to fasten the buttons on the curtains of appellee's berth, it was also negligence for her to fail to do so; and it was negligence for her to spread the curtains and to place herself in a position where it was possible to fall. This is not a case of a hazard peculiar to travel by train which was unknown to appellee. The danger of falling from high places is by no means confined to travel in Pullman cars. Appellee was well aware of this danger, for she testified that she protested against being required to ride in "that high berth" (R. p. 56).

The District Court's ruling apparently excuses appellee from taking any precautions for her own safety because of her alleged "confused and crippled condition." In the discussion of the first specification of error we have stated fully our position in this regard. We believe that appellee is bound by her testimony that she was in perfect health; and that in any event there is no substantial evidence that she was in such abnormal condition that she should be excused from taking ordinary precautions for her safety.

4. The motion to dismiss should have been allowed.

Appellant's motion to dismiss, made at the close of the testimony, raised the question whether there

was any substantial evidence of negligence on the part of appellant which proximately caused appellee's injuries, and whether appellee was guilty of contributory negligence. Reference is made to the discussion of specifications of error 1, 2 and 3, which fully states appellant's position concerning these matters. If any one of these propositions is well taken, it must follow that the motion to dismiss should have been sustained.

5. There was no issue at the trial of whether appellee's condition was so abnormal as to require appellant to fasten the inside buttons.

As we have stated, this case was tried on charges of negligence entirely foreign to that found by the District Court. Appellee did not contend at the trial that because of any incompetent condition on her part there was a duty on appellant to fasten the inside buttons on the curtains, and appellant had no knowledge that any such issue was involved. Appellee's contention was that there were no curtains on the berth; or if there were curtains, they were not closed and were not buttoned around the rod at the bottom of the berth so as to prevent appellee from falling from the berth. Instead of contending that she was incompetent to take precautions for her own safety, appellee insisted that she was perfectly normal.

Appellant's testimony concerning appellee's appearance and actions was introduced and was pertinent only for the purpose of presenting its theory of how the accident had happened and as bearing upon appellee's credibility. Consequently, aside from the testimony that the inside buttons on the curtains were intended for use of the passenger, no evidence was presented concerning the reasons why appellant's employees did not fasten the inside buttons; or their observations bearing upon appellee's ability to take precautions for her safety.

At the close of the testimony the court took the case under advisement and it was not until several days later, when the District Court rendered its memorandum decision, that appellant was advised of any issue concerning an asserted duty to fasten the inside buttons on the curtains arising by reason of a crippled or confused condition of appellee. It is entirely conceivable that there were compelling reasons why the buttons were not fastened by appellant. In fact, defendants' Exhibits 5, 6, 7 and 8 would indicate that it is impossible to do so from outside the berth. The purpose of such buttons is, of course, to enable the passenger to insure himself of privacy and control over access to the berth, which is ingeniously accom-

plished by affixing the buttons to an inner flap in such way that they do not extend through and are not visible from outside the curtains (see defendants' Exhs. 5, 6, 7 and 8). Appellant had no opportunity to anticipate this charge of negligence or to explain it.

We are aware of the fact that under Rule 15, Federal Rules of Civil Procedure, where issues not raised by the pleadings are tried and submitted by mutual consent, the court may treat them as having been pleaded. However, this rule is not applicable where there was no such issue and the evidence relied upon was received as being competent and material upon other issues and merely incidentally tended to prove another fact not in issue. *Simms v. Andrews* (C. C. A. 10), 118 F. (2d) 803, 807; *Allegheny County, Pa. v. Maryland Casualty Co.* (D. C. Pa., 1941), 42 F. Supp. 677. The rule should not be applied when the factual issue would be changed without an opportunity to defendant to make preparation to meet the changed situation. *Smith v. White, et al.* (D. C. Mo., 1942), 48 F. Supp. 554.

In *Sears, Roebuck & Co. v. Marhenke* (C. C. A. 9), 121 F. (2d) 598, this court held that Rule 15 had no application where the action was tried as one for negligence and the issue of liability for breach of

warranty, not raised in the pleadings, was not tried by the "express or implied consent of the parties."

In this case there was no issue at the trial of such an abnormal condition of appellee as would impose the unusual duty on appellant to fasten the inside buttons, and such an issue was not tried either by express or implied consent of the parties or otherwise. In these circumstances we believe Rule 15 should not have been applied and its application unfairly deprived appellant of the opportunity to submit evidence on an issue it did not know and had no way of knowing was in the case.

It is, therefore, respectfully submitted that the judgment of the trial court was erroneous and should be reversed.

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